Subject Index

	Page
Introductory Statement	2
Statement of the Case	3
Salient Facts, The	3
Question, The	6
Petitioners' Contentions	7
Argument, The	9
International Rules Applicable, The	9
True Object of Article 21: The "Svea's" Duty to Keep Course and Speed	12
How Long the Duty to Keep Course and Speed Continues	13
District Court, Applying the Settled Law of the Delaware Case Held the "Svea" Free from Fault	14
Rule Applied by the Circuit Court of Appeals	15
The Circuit Court of Appeals was in Error in Holding That the Failure of the "Newport" to Answer the Signals of the "Svea" was the "Distinct Indication" Required by the Delaware Rule	17
Circuit Court of Appeals Was in Error in Holding That the Failure of the "Newport" to Maneuver Immediately After the Last Signal From the "Svea" Was the "Distinct Indication" Required by the Delaware Rule	20
Any Distinct Indication That the "Newport" Was About to Fail in Her Duty to Avoid the "Svea" Being Absent, the "Svea" Was Not in Fault Under the Delaware Rule for Maintaining Her Course and Speed Until the Vessels Were in Extremis	29
Burden of Proof	30
Cases Cited in the Appendix	30
Conclusion	32
Appendix, The	i

Table of Authorities Cited

	Pages
Belden v. Chase, 150 U. S. 674	33
Breakwater, The, 155 U. S. 252	11
City of New York, The, 147 U. S. 72	30
Coamo, The, 280 Fed. 282	31
Cygnus, The, 142 Fed. 85	22
Delaware, The, 161 U. S. 459	12, 13, 24, 32
Deveaux Powell, The, 165 Fed. 634	23
Gladys, The, 144 Fed. 653	32
Haida, The, 191 Fed. 623	20
Hughes, Admiralty (2nd Ed.) p. 284 (Note)	10
International Rules—Act of Cong. Aug. 19, 1890, ch. 802, 26 Stat. L. 320, as amended by Act of Cong. May 28, 1894, ch. 83, 28 Stat. L. 83	3
John H. Starin, 162 Fed. 416	24
New York, The, 86 Fed. 814	21
Orduna, The, 14 Asp. Mar. Cas. 574	19
Senator Rice, The, 223 Fed. 524	32
Southern, The, 224 Fed. 210	31
Standard Dictionary	18
Tenadores, The, 298 Fed. 740	32
Victory and The Plymothian, The, 168 U. S. 410	30
West Hartland, The, 2 Fed. (2nd) 834	16, 31
Woolsum, The, 1926 Am. Mar. Cas. 1098	28
Yang-Tse Ins. Co. v. Furness, Withy & Co., 215 Fed. 859	31

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 146

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, administratrix of the estate of A. J. Patterson, deceased, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (libelants and cross-respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (libelants), *Petitioners,*

vs.

PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (respondent, claimant and cross-libelant), steamship "NEWPORT", her engines, boilers, tackle, etc., J. MCKINNON, Master of said vessel, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

INTRODUCTORY STATEMENT.

This is a libel in admiralty filed by petitioners, owners of the steamship "Svea", and a cross-libel by Pacific Mail Steamship Company, owner of the steamship "Newport", to recover damages for a collision between these vessels which occurred at 9:53 A. M. in the morning of November 29, 1922, off the coast of California.

The United States District Court for the Southern District of California decided that the collision was due solely to the gross negligence and plain fault of the "Newport"; that the plea of contributory negligence on the part of the "Svea" was not sustained by a preponderance of the evidence, and that the half-damage-rule was not applicable. The opinion of the District Court is reported in 1924 Am. Mar. Cases, p. 1285, and may also be found on page 63 of the transcript.

The United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the lower court, and ordered a decree based upon mutual fault. The opinion of the Circuit Court of Appeals is reported in 15 Fed. (2nd) 342, and may also be found on page 239 of the transcript.

A writ of certiorari was granted by the court on the 10th day of January, 1927.

I. STATEMENT OF THE CASE.

A. THE SALIENT FACTS.

The collision between the "Newport", an iron passenger steamship carrying many passengers, and the "Svea", a wooden lumber steam schooner, occurred in broad daylight on the Pacific Ocean along the coast of California. The vessels were on *crossing courses.* The "Newport" had the "Svea" on her starboard side and was required by the International Rules* to *"keep out of the way of the other"* (Article 19); the "Svea" was required by the same rules to *"keep her course and speed".* (Article 21.)

It is admitted that the "Newport", without excuse, did *not* keep out of the way of the "Svea", and did *not* do any of the specific acts required by the rules, viz., "avoid crossing ahead of the other" (Article 22); "slacken her speed or stop or reverse". (Article 23.) It is also admitted that the "Svea" did keep her course and speed in accordance with Article 21.

The vessels were in sight of each other from the time when they were about eight miles apart. The "Newport" was proceeding in a roughly easterly direction (south 79° east magnetic), with a speed of nine to ten knots an hour, the "Svea" in a roughly northerly direction (NW x N½ N magnetic), with a speed of about seven and one-half knots. The master and mate of the "Svea" were watching the approaching "Newport", expecting an indication as to what she was going to do to keep out of the way of the "Svea". When the vessels were about two miles

*Act of Cong. Aug. 19, 1890, ch. 802, 26 Stat. L. 320, as amended by Act of Cong. May 28, 1894, ch. 83, 28 Stat. L. 83.

apart, and the "Newport" had given no indication by signal how she proposed to avoid the "Svea", but had apparently kept her course and speed, the "Svea" blew one whistle indicating that she was keeping her course and speed as required by law. Both ships then proceeded on their courses with unaltered speed until they were a little over a mile apart. As the "Newport" had given no signal, the "Svea" gave a danger signal, keeping her course and speed. When the vessels had proceeded until they were about three-eighths of a mile apart, bearings still being unchanged, and the expected notification not coming from the "Newport", the "Svea" blew a second danger signal.

At this stage it was still possible for the "Newport" to avoid the "Svea" by porting, or by slackening her speed, or stopping, or reversing. The master and mate kept anxiously watching for signals or appropriate movements from the "Newport", knowing that she still had plenty of time to clear the "Svea", and expecting "that the other man might port his helm, or stop and back, or clear me; I did not consider which way, but I considered that he would clear me in some shape or other." (R. 213.) The "Newport" was "an easily handling ship", and, according to the testimony of her master, would begin to change her course within five or ten seconds after putting the wheel over, before she had gone a ship-length (R. 123, 124); it therefore *remained possible for the "Newport" to avoid the "Svea" by her own maneuvers until the vessels were about a ship-*

length apart. The master of the "Svea" testified, his testimony being uncontradicted:

> "That when he blew the second danger signal and the ships were coming close together, *there was plenty of time for the 'Newport' to clear the 'Svea';* * * * that after he blew his last danger signal he considered whether or not he should stop the 'Svea' or back, but that he decided to go ahead, *believing that the 'Newport' would change* and knowing that the 'Svea' had the right of way; that if he had stopped or slackened speed or reversed in an effort to avoid collision and the 'Newport' at the same time had ported her helm, there would have been a collision. On cross-examination he said that when the ships were over a quarter of a mile apart he concluded that (if) he acted there would be some mistake and that it was best to keep his course and speed; that *he did not know what the 'Newport' was going to do; that he doubted what she was going to do; that he knew what the duty of the 'Newport' was and that there was a chance for her to go clear.*"
>
> (Opinion of Circuit Court of Appeals, R. 241, 242.*)

The trial court found:

> "The 'Svea' first realized that the 'Newport' was not going to do anything *when the ships were but two hundred feet apart, and nothing could thereafter have been done by the 'Svea' which would have prevented or avoided the collision* with the 'Newport'. I am satisfied from the evidence and from the testimony of the Master of the 'Svea' that he was always uncertain as to the activities of the 'Newport' and as to those in charge of her navigation, * * * . The evidence of the Master of the 'Svea' convinces me that *he had no distinct, clear and unmistakable indica-*

*Italics ours.

tion that the 'Newport' would fail in her duty until he had rightfully reached a point where he was in extremis and where probably a collision was unavoidable, and I am also satisfied that he then exercised his best judgment, to strictly comply with the rule." (R. 65-66.)

The master of the "Svea" testified, without contradiction:

"After I blew the second four blasts *there was plenty of time for them to act*, and plenty of time for me to act, *if I was given some signals.*" (R. 203.)

When the ships were about two hundred feet apart, and the master of the "Svea" first realized that the "Newport" was not going to do anything, he put his helm hard aport to ease the blow. (R. 203.) The engines of the "Newport", just before the collision, "were going full speed astern." (R. 122.) The stem of the "Newport" struck the "Svea" at about right angles, on the port side about eighty feet forward of the stern, damaging her so that she later capsized.

B. THE QUESTION.

The question arises under the principles of law upon which the decision of the Circuit Court of Appeals rests. We believe these principles to be erroneous and in conflict with the settled law as declared by this court.

The Circuit Court of Appeals said:

1. "While the argument that the 'Svea' as the holding-on vessel, was under a primary duty to

keep her course and speed (article XXI), and that it was the duty of the 'Newport' to keep out of her way, is sound as far as it is applicable, nevertheless, as we held in the West Hartland Case, 2 F. (2) 834, the duty imposed upon the 'Svea' did not relieve her of the responsibility of deciding if and when it was necessary to depart from the rule in order to avoid immediate danger." (R. 242.)

2. "The fact that the 'Newport' failed to manoeuver immediately after the last signal from the 'Svea', when considered with the immediately antecedent facts and circumstances as already outlined, made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest. It therefore became the duty of the 'Svea' to yield adherence to the primary right to hold her course and speed, and to do what she could to avoid disaster." (R. 244.)

C. PETITIONERS' CONTENTIONS.

The contentions of petitioners were upheld by the District Court and are discussed in its opinion. (R. 63-68.) They differ from the views of the Circuit Court of Appeals *toto caelo* and may be summarized as follows:

First: The responsibility of deciding if and when it becomes necessary for the hold-on* vessel to depart from her duty of holding her course and speed arises only in two cases, viz.:

---

*In this brief we will refer to a vessel in the position of the "Svea" as the "hold-on" vessel, and a vessel in the position of the "Newport" as the "give-way" vessel, to correspond to their respective duties under the rules.

1. If and after the give-way vessel has given a distinct indication that she is about to fail in her duty.

2. In the absence of such distinct indication: if and after it has become impossible for the give-way vessel to avoid the hold-on vessel.

Concretely: The "Svea" was responsible for a decision as to whether it was necessary for her to depart from the rule only if the facts show that the "Newport" gave a distinct indication that she was about to fail in her duty; or, in the absence of such distinct indication, only after it had become impossible for the "Newport" to avoid the "Svea".

Second: The doctrine of the Circuit Court of Appeals, enunciated in the "West Hartland" case and followed in the instant case, is contrary to the settled law of the Supreme Court in that it requires the hold-on vessel to depart from the rules when and because her master *is in doubt* as to the navigation of the give-way vessel, although the give-way vessel has given no distinct indication that she is about to fail in her duty.

Third: The fact that the give-way vessel fails to maneuver, or continues her course and speed during the period while it is possible for her to avoid the hold-on vessel is not such a distinct indication that the give-way vessel is about to fail in her duty as is required under the rule of the Supreme Court.

Concretely: The fact that the "Newport" failed to maneuver immediately after the last signal from the "Svea", when considered with the immediately

antecedent facts and circumstances, was not such a distinct indication that the "Newport" was about to fail in her duty as was required by the rule of the Supreme Court.

Fourth: The "Svea" had at no time a distinct indication that the "Newport" was about to fail in her duty. Until the two ships were in extremis, the master of the "Svea" remained in doubt as to the intentions of the "Newport", expecting until the last moment that she would comply with the law and take the proper steps to avoid his vessel.

Fifth: It was possible for the "Newport" to avoid the "Svea" down to the moment when the vessels had reached a position where they were only a ship's length apart. Down to this moment, and until the vessels had reached this proximity the "Svea" was required by settled law to hold her course and speed.

We proceed to show that petitioners' contentions are in accord with the settled law as declared by this court, whereas the decision of the Circuit Court of Appeals is in conflict with that law.

II. THE ARGUMENT.

A. THE INTERNATIONAL RULES APPLICABLE.

The present International Rules were adopted in 1890, at an international marine conference held at Washington. Prior to their adoption the rules applicable to ships on crossing courses were different, *both ships* being formerly required to change course

and speed, if necessary, to avoid collision.* Under the present rules one of the ships (the hold-on vessel) is under an imperative obligation to keep her course and speed so as to enable the other (the give-way vessel) to understand the present and future movements of the other and take the proper measures to avoid collision with her. The applicable present rules are:

> *Article 19:* "When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side *shall keep out of the way* of the other."
>
> *Article 21:* "Where, by any of these rules, one of two vessels is to keep out of the way *the other shall keep her course and speed.*"
>
> "Note. When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.)"
>
> *Article 22:* "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."
>
> *Article 23:* "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

The primary duties which these rules impose upon the "Newport", having the "Svea" on her own starboard, are the following:

---

*"This great change in the rule renders it necessary to be circumspect in citing cases arising before the change, as many vessels might have been obliged to stop and back then which would not be required to do so now. A privileged vessel, which stops and backs now, unless at the last moment as a desperate effort to avert certain collision, would commit a fault, instead of obeying the law."

(*Hughes, Admiralty,* (2d ed.) p. 284.)

a. The absolute duty to keep out of the way of the "Svea". (Art. 19.)

b. The absolute duty to avoid crossing ahead of the "Svea". (Art. 22.)

c. The contingent duty to slacken her speed or stop or reverse. (Art. 23.)

The undisputed evidence shows that the "Newport" violated every one of these duties.

The primary duties which the rules impose upon the "Svea" are the following:

a. The absolute duty to keep her course and speed. (Art. 21.)

b. The contingent duty to take such action as will best aid to avert collision when the "Newport" came so close that collision *could not be avoided by the action of the "Newport" alone.* (Note to Art. 21.)

The undisputed evidence shows that the "Svea" performed all these duties, but she is charged with having adhered too long to her primary duty to hold her course and speed.

In this connection it is well to recall the warning of the court in *The Breakwater,* 155 U. S. 252, 264:

> "Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24, which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or non-observance of a rule becomes a matter of doubt or discretion, there is manifest danger, for

the judgment of one pilot may lead him to observe the rule, while that of the other may lead him to disregard it."

B. THE TRUE OBJECT OF ARTICLE 21: THE "SVEA'S" DUTY TO KEEP COURSE AND SPEED.

The Circuit Court of Appeals condemns the hold-on vessel for "adherence to the primary right to hold her course and speed." In fact, however, the situation of the two vessels does not involve the question: What was the *right* of the "Svea"? but rather involves the question: What was her *duty* under the circumstances? This distinction seems to us of fundamental importance; for the stubborn adherence to a right is prima facie blameworthy, whereas the steadfast performance of a duty is prima facie laudable. The theory that the master of the hold-on vessel, while holding course and speed, insists upon the exercise of a right, makes it easier to condemn him, than the theory that he submits to a duty which may be disagreeable and exciting. The true view of the situation is, that both vessels have distinct legal obligations; neither the one nor the other is "privileged" in any proper sense, but each one is "burdened" with duties. That this view is the correct one appears from the language of the rule itself: "*shall* keep her course and speed." This is as imperative a duty as the duty of the other vessel that it "*shall* keep out of the way."

In *The Delaware,* 161 U. S. 459, 468, the court said:

> "That her primary *duty* is to keep her course is beyond all controversy."

E. THE RULE APPLIED BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals stated the law of the case as follows:

> "In The Delaware, 161 U. S. 459, the court held that the preferred steamer would not be held in fault for maintaining her course and speed so long as it is possible to avoid her by porting; at least, in the absence of *some indication* that she is about to fail in her duty." (R. 243.)

The above excerpt shows clearly the departure of the Circuit Court of Appeals from the rule announced by this court in *The Delaware.* This court held that a *distinct* indication was the test, while the Circuit Court of Appeals erroneously interpreted *The Delaware* as holding that *some* indication would require the hold-on vessel to change courses.

This departure from the rule is extremely important, because under *The Delaware,* and other decisions which we will discuss, the maneuvers of the "Newport" did not convey a "distinct indication" to the "Svea", which would require her to change her course.

The Circuit Court of Appeals also found that:

> "The fact that the 'Newport' failed to maneuver immediately after the last signal from the 'Svea', when considered with the immediately antecedent facts and circumstances as already outlined, made it *distinctly apparent, we think,* that she intended to persist in her course * * * ." (R. 244.)

The theory of the Circuit Court of Appeals appears to be therefore that, if the actions of the give-way

vessel make it distinctly *apparent* that she intended to persist in her course, it was the duty of the hold-on vessel to abandon the primary duty of keeping her course and speed.

The case of *The West Hartland,* 2 F. (2d) 834, referred to in the opinion of the Circuit Court of Appeals, throws light upon the meaning which the court attaches to the words "distinctly apparent". There, the court said:

> "For some considerable time before the collision, the master of the West Hartland *was in doubt* as to the course the Governor intended to pursue, and *under such circumstances* it was his plain duty to solve that doubt in favor of safety by giving a danger signal or taking timely steps to avoid a collision * * * ."

In other words the theory of the Circuit Court of Appeals is that the hold-on vessel must abandon her duty to hold her course and speed when her master is *in doubt* as to the course of the give-way vessel.

We contend that, while he is in that frame of mind, he merely speculates upon the possibility of the give-way vessel failing to do her duty, and that a rule permitting him to act upon such speculations "would bring about more collisions than it would prevent."

A finding that the activities of the "Newport" *"made it distinctly apparent, we think,* that she intended to persist in her course" is not sufficient to support a finding of fact that there was even *"some* indication that she was about to fail in her duty"; but under the settled law of *The Delaware*

the latter finding would be insufficient; for there must be a "*distinct* indication."

F. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN HOLDING THAT THE ASSUMED FACT THAT THE FAILURE OF THE "NEWPORT" BECAME "DISTINCTLY APPARENT" TO THE MASTER OF THE "SVEA" SATISFIES THE REQUIREMENTS OF THE RULE OF THE DELAWARE CASE.

The District Court decided that the "Svea" was not in fault for maintaining her course and speed, because it was always possible for the "Newport" to avoid her, and because the "Newport" gave no distinct indication that she was about to fail in her duty.

The Circuit Court of Appeals decided that the "Svea" was in fault for maintaining her course and speed, because the facts made it distinctly apparent that the "Newport" intended to persist in her course.

We contend that the decision of the District Court is within the *Delaware* rule, but the decision of the Circuit Court of Appeals is in conflict with that rule, in this respect: We grant for the sake of argument that the facts made it distinctly apparent to the master of the "Svea" that the "Newport" intended to persist in her course, but contend that, even on that assumption, his mind was still in that condition of doubt and speculation in which the rule of the Supreme Court prohibits him from changing his course and speed. We reserve, however, the important point that it never became distinctly apparent to the master of the "Svea" that the "Newport" intended to persist in her course, but that "he was always *uncertain*

as to the activities of the 'Newport' ". (Finding of the District Court, R. 65), and that he "considered that he would clear me in some shape or other." (R. 213.)

The grammatical meaning of the word "apparent", the meaning which the Circuit Court of Appeals attaches to it in its opinion, and the meaning given to it by respondent in its argument are identical. They all agree that, as long as the intention of an actor is "apparent" to the observer, the latter is still in doubt.

The Standard Dictionary, under the heading "apparent", gives the following definition:

> "Apparent indicates less assurance than probable, and more than seeming. A man's probable intent we believe will prove to be his real intent; his seeming intent we believe to be a sham; his apparent intent *may be* the true one, though we have not yet evidence on which to pronounce with certainty or even with confidence."

The *Delaware* rule forbade the "Svea" from changing course and speed as long as her master thought: "His apparent intent may be the true one, but I am not sure, I am in doubt."

We have already shown that the Circuit Court of Appeals understands, by using the word "apparent", that the observer must act when he is in doubt; that he must resolve such doubt in favor of safety.

Here, then, is the clear-cut issue between the parties: Respondents contend, and the Circuit Court of Appeals holds that "distinct indication" and "doubt" are identical in this connection; that, when

the Supreme Court laid down the *Delaware* rule, that the master of the hold-on vessel will not be held at fault for holding on as long as he has no distinct indication, it intended to rule that the master will be held at fault for holding on when he is in doubt as to the course of the give-way vessel.

Such a contention is, of course, greatly facilitated by omitting the word "distinct" from the language of *The Delaware* opinion and substituting therefor the word "some"; but it is obvious that "some indication" and "distinct indication" are not synonymous terms.

The rule of the *Delaware* contains a distinct warning against the "terrible doubt of appearances", which the poet applies to all speculations, but which is particularly applicable to the case where the lawful actor is sought to be condemned by the confessed wrongdoer for not violating his primary duty.

The same warning is given by Scrutton, L. J., in *The Orduna,* 14 Asp. 574, 577 (Court of Appeal, 1919):

> "It strikes me as very hard to find the stand-on ship to blame because, when the other ship is *apparently* going to break the rules, the stand-on ship does not appreciate rightly the exact moment at which she is free to act.
>
> "* * * in The Norman Monarch (sup.), where a very similar problem was presented, all the members of the House of Lords who delivered judgment, I think, came to the conclusion that the fact that the vessel was *apparently* going to cross ahead was not a justification for the stand-on vessel departing from the rule."

In *The Delaware* case the identical issue of the effect of appearances under similar circumstances was before the court, the opinion stating:

> "The main fault charged upon the Talisman (the hold-on vessel), however, is that of not stopping and reversing, when the failure of the Delaware (the give-way vessel) to take measures to avoid her *became apparent.*" (161 U. S. 467.)

The court held directly that the fact that the failure of the give-way vessel *"became apparent"* to the hold-on vessel is not sufficient to relieve the latter from her duty to keep her course and speed, but that *"some distinct indication"* is necessary.

In *The Haida,* 191 Fed. 623, 625, the captain *"observed* that there would be a collision". The court said:

"That is not enough."

G. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN HOLDING THAT THE FAILURE OF THE "NEWPORT" TO ANSWER THE SIGNALS OF THE "SVEA" WAS THE "DISTINCT INDICATION" REQUIRED BY THE DELAWARE RULE.

What is a distinct indication depends upon the circumstances. There must always be some definite act on the part of the give-way vessel, distinct enough to communicate to the hold-on vessel her intention to take a course contrary to her legal obligation. This intention is ordinarily expressed by some unmistakable signal; for the mere change of course or speed, without the corresponding signal, might be *"some* indiction" of her intention, but would not be a *"distinct*

indication." If, in the instant case, the "Newport" had given a signal to the "Svea" indicating that she intended to maintain her course and speed and to cross the bow of the "Svea", respondent might argue with some plausibility that this was some indication of her intention.

It has, however, been held in *The New York,* 86 Fed. 814 (C. C. A. 6) that, in the circumstances of the instant case, even whistles by the "Newport" indicating that she intended to fail in her duty to avoid the "Svea" would not have been such a "distinct indication" as would have thrown upon the "Svea" the burden of changing her primary duty to keep her course and speed. In that case the Conemaugh was the give-way vessel and the New York the hold-on vessel, and it was argued that a two-blast whistle of the Conemaugh was a distinct indication to the New York that the Conemaugh was about to fail in her duty to keep out of the way of the New York and that, by reason of this indication, it became the duty of the New York to stop and reverse. The court said, by Taft, C. J.:

> "This conclusion of fact is important in considering the next point made in the petition for rehearing,—that the Conemaugh's two blast whistles were distinct indications of her intention to do what she did. In situations where a vessel is pursuing a course which the law gives her the right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But we apprehend that, where a vessel has no right to pursue a particular course without receiving the assent of the vessel she is meeting, the whistles she uses to

> obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that, on failure to obtain the assent she seeks, she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference." (86 Fed. 816.)

If the signals of the give-way vessel, advising that she proposes to fail in her duty are not a distinct indication of her intention to fail in her primary duty, it follows a fortiori that mere silence is not a distinct indication such as the law requires before the hold-on vessel is permitted to change her course and speed.

In *The Cygnus,* 142 Fed. 85 (C. C. A. 2) the give-way vessel gave two blasts indicating that she proposed to cross the bow of the hold-on vessel. The latter dissented by giving one blast. This interchange of signals was repeated. The hold-on vessel, however, obeyed the rule and continued her course and speed. The district judge held her in fault because she did not stop and reverse. The decree was reversed on appeal, and the give-way vessel held solely at fault. The court said:

> "The Cygnus' (give-way vessel) two blasts given at that time were but an *invitation* to modify the rule which she was perfectly justified in proposing. It might well be assumed that, so long as the invitation, even if repeated later still at a safe distance, was not accepted, *the rule would be followed.*" (142 Fed. 88.)

If, therefore, the "Newport" had blown signals to indicate that she proposed to cross the bow of the "Svea", this would not have been a distinct indica-

tion that she was about to do so, if the "Svea" had dissented by giving signals that she would keep her course and speed. A fortiori the "Newport's" silence, after the "Svea's" notification that she was keeping her course and speed was not a "distinct indication" that the "Newport" was about to fail in her duty; the natural interpretation of this silence was that she was content to follow the law.

In *The Deveaux Powell,* 165 Fed. 634, (C. C. A. 2) a tug, the give-way vessel, ran into the port quarter of a ferry boat, the hold-on vessel, on crossing courses. The district judge imputed contributory fault to the hold-on vessel, because her pilot

> "twice claimed the right of way (by sounding one whistle) and understood that it was not accorded. He knew of the continued inattention or misapprehension of the pilot of the tug, as the vessels converged over a considerable distance on crossing courses, and yet kept on his way to the menaced condition." (120 Fed. 523.)

The decree of the District Court was, however, reversed on appeal as to the hold-on vessel, on the ground that all that the pilot of the hold-on vessel "knew was that the tug had twice failed to answer his signals and that the vessels were approaching on crossing courses; but * * * a trifling change of her helm to port would have set her in safety under the stern of the ferryboat." (165 Fed. 635.)

In the instant case a trifling change, in the last few seconds, of the "Newport's" helm to port would have deflected her bow sufficiently to enable the remaining eighty feet of the "Svea" to pass into safety.

In *The John H. Starin,* 162 Fed. 146 (C. C. A. 2), the give-way vessel blew three successive two-blast whistles, indicating a wish to navigate contrary to the rule. The hold-on vessel responded each time with a one-blast whistle, indicating that she refused to allow a modification of the rule. It was held by both courts that it was the duty of the hold-on vessel to maintain her course and speed.

If an improper signal, three times repeated, is not a distinct indication that the vessel "is about" to fail in her duty to keep out of the way: how could it be reasonably contended that the mere failure to give signals, or the failure to answer unnecessary, though proper, signals, was a distinct indication of an intention to disregard the rule?

In *The Delaware,* supra, the hold-on vessel gave two separate one-blast signals, and an alarm signal, none of which signals was answered by the give-way vessel. The court exonerated the hold-on vessel, thereby impliedly holding that the mere failure of the give-way vessel to answer signals of the hold-on vessel is not a distinct indication that the give-way vessel is about to fail in her duty to avoid the hold-on vessel.

In the instant case the one-blast signal given by the "Svea" was dictated by caution. It indicated that the "Svea" intended "to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her." (*The Delaware,* 161 U. S. 467.) The signal was not necessary and required no answer; hence the failure of the "Newport" to answer had no significance and could not be

considered as an indication that she was about to fail in her duty. When the ships were a little over a mile apart the "Svea" gave a danger signal; to this signal no answer was required by the international rules. Suppose the "Svea" had, immediately after the first danger signal, changed her course and speed, and a collision had occurred, she would have been held at fault by the Circuit Court of Appeals, which apparently thought that the proper time for the "Svea" to act had not come until later, when she repeated the danger signal. The duties of the "Newport" were in no wise modified by the alarm signals of the "Svea". These signals merely indicated to the "Newport" that the "Svea" was "in doubt" as to how the "Newport" intended to avoid her. (Compare Art. 23, Rule III, Inland Rules.) The "Svea's" second alarm signal indicated that she was still in doubt. In that moment the "Newport" still had ample opportunity to avoid the "Svea"; hence her failure to answer was consistent with an intention to avoid the "Svea" within the margin of time still remaining. It was not an indication—certainly not a distinct indication—that she intended to persist in her course and cross the bow of the "Svea". A distinct indication would have required at least some definite notification by signal, or some visible maneuver.

H. THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN HOLDING THAT THE FAILURE OF THE "NEWPORT" TO MANEUVER, IMMEDIATELY AFTER THE LAST SIGNAL FROM THE "SVEA", WAS THE "DISTINCT INDICATION" REQUIRED BY THE DELAWARE RULE.

The Circuit Court of Appeals held that the failure of the "Newport" to maneuver immediately after the last signal from the "Svea" "made it distinctly apparent, we think", that she was about to fail in her duty. The finding of the trial court is, however, that it was not distinctly apparent to the master of the "Svea", but that he was "always uncertain". At all events it was not a "distinct indication" in the sense of the *Delaware* rule.

In the nature of things the intention of a crossing vessel burdened with the duty of keeping out of the way and pursuing a given course in silence is ambiguous as long as she has the opportunity to keep out of the way. She may at any moment change her course or speed in compliance with her statutory duty, or she may intend to fail in her duty. However, the master of the other vessel, watching her progress, is justified in assuming that she will obey the law while it is possible for her to do so. The master of the "Svea", observing the "Newport's" maneuvers, was, as the trial judge held, required to assume that this burdened steamship, of large size and carrying many passengers, proceeding at a speed between nine and ten knots per hour in the open sea, was properly manned and officered; he was further required to assume that she would, in obedience to the law of the sea, take the necessary steps to avoid the "Svea" while it was possible for her to do so, no

whistles or other positive indications to the contrary having been received. As to whether she would avoid the "Svea" by porting, or by stopping and reversing, or by both measures, remained a matter of doubt in his mind.

The Circuit Court of Appeals held that the fact that the "Newport" *failed to maneuver* immediately after the last signal from the "Svea" "made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest. It therefore became the duty of the 'Svea' to yield adherence to the primary right to hold her course and speed, and to do what she could to avoid disaster."

But this exact proposition was considered by the Supreme Court in the *Delaware* case and rejected. The court, in discussing previous divergence between the authorities said:

> "Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a *continuance upon her course* involves an *apparent* danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by *doubts* as to his duty, and, unless the two vessels be in extremis, he is bound to hold his course and speed." (161 U. S. 468.)

The Supreme Court weighed these two divergent views (one of which is supported by cases arising under the old law, when action was required by both vessels) and decided in favor of the present rule, *rejecting the suggestion that the mere continuance of the give-way vessel upon her course, although involv-*

ing apparent danger of collision, changes the duty of the hold-on vessel and makes it her duty to yield adherence to what the court below calls "the primary right to hold her course and speed."

No one would now seriously attack the potency of the reasons for the settled rule, expressed by the court in the *Delaware* case in the following words:

> "If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way; the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. Belden v. Chase, 150 U. S. 674; The Highgate, 62 L. T. R. 841; S. C. 6 Asp. Mar. Law Cases, 512." (161 U. S. 469.)

In the case of *The Woolsum,* 1926 Amer. Mar. Cases, 1098, on p. 1109 (C. C. A. 5), recently decided, the court said correctly:

> "The fact that the West Himrod * * * *continued to go forward* * * * was not enough to show that she would not stop before she crossed the bows of the Woolsum * * *."

I. ANY DISTINCT INDICATION THAT THE "NEWPORT" WAS ABOUT TO FAIL IN HER DUTY TO AVOID THE "SVEA", BEING ABSENT, THE "SVEA" WAS NOT IN FAULT UNDER THE DELAWARE RULE FOR MAINTAINING HER COURSE AND SPEED UNTIL THE VESSELS WERE IN EXTREMIS.

The evidence shows that it was possible for the "Newport" to avoid the "Svea" until the vessels had approached within the distance of a ship's length. The master of the "Newport" testified that she was "an easily handling ship, a handy ship to handle" (R. 124), and that "before you had gone a shiplength she would start to turn." The "Newport" struck the "Svea" about 80 feet forward of the stern; at her rate of speed these eighty feet would have been traversed by the "Svea" in a few seconds. A trifling porting of the "Newport's" wheel, or reversing, a few seconds before the collision would have set the "Svea" in safety and prevented the collision. To quote again from the *Delaware,* mutatis mutandis: "Until the last moment the 'Svea' had a right to assume that the 'Newport' would comply with the rule." (161 U. S. 469.)

When the vessels were at the distance of a shiplength, they were in extremis and no action by the "Svea" could have saved the situation. The District Court found:

> "The 'Svea' first realized that the 'Newport' was not going to do anything when the ships were but two hundred feet apart, and nothing could thereafter have been done by the 'Svea' which would have prevented or avoided the collision with the 'Newport'." (R. 65.)

J. BURDEN OF PROOF.

Under the settled law the "Newport", being admittedly at fault, assumed the burden of showing beyond any doubt that some fault of the "Svea" contributed to the collision. In *The City of New York,* 147 U. S. 72, 85, this court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is *not enough for such vessel to raise a doubt with regard to the management of the other vessel.* There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In *The Victory & The Plymothian,* 168 U. S. 410, 423, this court said:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be *clear and convincing* in order to make a case of apportionment."

Under the rule of these cases it was incumbent upon the "Newport" to show how the "Svea" could have avoided the collision by some maneuver on her part. It was not sufficient to raise a mere doubt by asserting that she should have done "something", or that she was at fault because the collision occurred on a clear morning.

K. CASES CITED IN THE APPENDIX.

We are satisfied that *The Delaware* and the other authorities cited herein show conclusively that the

decision of the Circuit Court of Appeals should be reversed.

For the convenience of the court, however, we have cited in an Appendix some leading authorities of the English law, showing that the law of England is in harmony with the rule of the *Delaware* case; and have also epitomized and classified the relevant cases cited on both sides of the controversy in the lower courts, dividing them as follows:

First Class: Cases where the hold-on vessel was condemned for changing course and speed.

Second Class: Cases where the hold-on vessel was upheld for maintaining course and speed.

Third Class: Cases where the hold-on vessel was excused for changing course and speed.

Fourth Class: Cases where the hold-on vessel was condemned for maintaining course and speed.

It will be noted at a glance that the cases of the *first* and *second* class support the contentions of petitioners. In some of these cases the hold-on vessel was condemned for doing what respondents claim the "Svea" should have done. Nevertheless respondents have cited several of the cases of the first class, such as *The Coamo, The Southern, The West Hartland* and *Yang-Tse Ins. Co. v. Furness, Withy & Co.,* relying upon dicta extracted from these cases.

In the cases of the *third* class (Nos. 21-26) the hold-on vessel was excused for taking action on the ground that its action was taken in extremis, and on the further ground that the give-way vessel had

given distinct indication that she would not obey the rule.

In the cases of the *fourth* class (Nos. 27-31), action on the part of the hold-on vessel was required under the rule of the *Delaware* case: In *The Gladys* (No. 27) the give-way vessel was a tug with three barges in tow, the whole 4000 feet long. It was an *impossibility* for the give-way vessel to avoid the hold-on vessel. Hence, the hold-on vessel was held in fault for maintaining course and speed. In *The Senator Rice* (No. 28) the court held that a signal by the give-way vessel indicating: "I am going to cross your bow" is the "distinct indication" required by the rule. In *The Tenadores* (No. 29) the give-way vessel signaled: "Get out of my way, or I'll run you down". The court considered this to be a "distinct indication."

In some cases a visible *change* of course by the give-way vessel, evidenced by the shifting of lights, may be a distinct indication that the give-way vessel is not taking the proper steps to keep out of the way; but this is obviously different from the instant case where the give-way vessel *fails* to change within the time when it is possible for her to do so.

CONCLUSION.

It seems clear from the foregoing discussion that the case of *The Delaware* (supra) and the decision of the Circuit Court of Appeals in the instant case

cannot stand together. It would be difficult to find a more analogous condition of facts. In both cases the hold-on vessel blew whistle signals which were not answered by the give-way vessel and held her course and speed. In both cases the hold-on vessel is charged with the alleged fault "of not stopping and reversing when the failure of the 'Delaware' to take measures to avoid her *became apparent.*" (161 U. S. 467.) In the *Delaware* case the court decided that the fact that it "became apparent" to the hold-on vessel that the give-way vessel failed to take measures to avoid her is not sufficient to hold her at fault, but that "distinct indication" is required; the court also decided that the failure of the give-way vessel to answer the whistle signals blown by the hold-on vessel was not the "distinct indication" required which would justify the court in holding her in fault.

The conclusion is inevitable that the decision of the Circuit Court of Appeals is contrary to the settled law as declared by the Supreme Court. It is also contrary to the principle stated by the court in *Belden v. Chase,* 150 U. S. 674, 699:

> *"Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely upon the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. The Oregon,* 18 How. 570."

The decision of the Circuit Court of Appeals, decreeing a division of damages in this case, should be reversed.

Dated, San Francisco,
November 9, 1927.

Respectfully submitted,
LOUIS T. HENGSTLER,
FREDERICK W. DORR,
Proctors for Petitioners.

(APPENDIX FOLLOWS.)